IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No.

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION,

Petitioner,

vs.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The findings of fact (R. 20-29) and conclusions of law (R. 29-31) of the District Court of the United States for the District of Columbia are unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 113-119) is as yet unreported.

Questions Presented, Statutes Involved, Etc.

A statement of the questions presented, statutes involved, jurisdiction, specification of errors to be urged and a statement of the case will be found in the foregoing petition.

Summary or Argument.

The United States were not indispensable parties to the suit here involved for the following reasons:

I. Postal savings funds do not belong to the United States and the deposits of such funds in the Woodlawn Trust and Savings Bank did not create a debtor and creditor relationship between the Bank and the United States.

II. The fact that the faith of the United States is pledged to the repayment of deposits in Postal Savings depository offices does not require that the United States be made a party to this suit.

III. The fact that the Treasurer of the United States is a party to this suit does not make the action one against the United States nor require that the United States be made a party.

IV. The fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the Trustees of the Postal Savings System nor render the United States an indispensable party to a suit brought against the Trustees.

Accordingly the Court below erred in concluding that it was without jurisdiction either to compel the Treasurer of the United States to surrender the bonds or to compel the Trustees to make any payments out of monies deposited in the Treasury of the United States, earmarked as postal savings funds, which funds are controlled by the Trustees of the Postal Savings System under the terms of the Postal Savings Act.

ARGUMENT.

I.

Postal savings funds do not belong to the United States and the deposits of such funds in the Woodlawn Trust and Savings Bank did not create a debtor and creditor relationship between the bank and the United States.

The Court below held that the deposit of the Postal savings funds in the Woodlawn Trust and Savings Bank was a deposit of money belonging to the United States (R. 117) or at least that a debtor and creditor relationship had been created between the original depositor in the Postal Savings System and the United States (R. 118). This was one of the reasons for the conclusion of the Court that the United States were necessary and indispensable parties to the suit.

However, as pointed out in the petition attached hereto, the decision of the Court below is in conflict with the decision of the Court of Claims in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States,* 69 Court of Claims Reports 79 (decided February 10, 1930). In that case the Court of Claims referred to the postal savings fund made up of deposits in the various Postal Savings Depositories and said:

> "No part of the fund, it will be observed, went into the Treasury of the United States or became the property of the United States. It was held in trust separate and apart from the funds of the Government. Such being the case the Secretary of the Treasury has no fund out of which to pay the judgment of this court, as it is not payable out of any Government

> funds. The debt due on this deposit is not a liability of the United States payable out of its funds. It is payable out of the funds in the hands of the trustees, namely, the funds deposited under the postal savings system, and such regulations as they had promulgated as to withdrawals and conditions of payment."

We think that the Court of Claims reached the correct conclusion in the *Leka case.*

The Postal Savings System was established by the Act of June 25, 1910, entitled "An Act to establish postal savings depositories for depositing savings at interest with the security of the Government for repayment thereof, and for other purposes." (U. S. Stat., Second Session, 61st Cong., p. 814). The Act *"created a board of trustees"* for the *control, supervision and administration* of the postal savings depository offices, *and of the funds* received as deposits at such postal savings depository offices. That board is composed of the individuals holding the offices of Postmaster General, Secretary of the Treasury and Attorney General, and the personnel of the board changes as changes occur in the persons holding those offices, but those officers do not act in their respective governmental capacities of Postmaster General, Secretary of the Treasury and Attorney General in controlling, supervising and administering the postal savings depository offices and the funds received as deposits at such offices, but *in the capacity of trustees.* For whom do they act as trustees? The answer necessarily is, for the persons who deposit money in the postal savings depositories established under the Act, because such depositors are entitled to be repaid out of the funds so deposited or out of the proceeds of any securities in which the funds may be invested, and no part of such funds belongs to the United States, nor can the

United States use any of such funds for governmental purposes unless it borrows from the trustees and gives its bonds promising repayment thereof.

Inasmuch as under the decision of the Court of Claims in the *Leka case* the deposit of funds by a depositor in a postal savings depository office does not confer ownership of those funds upon the United States nor create a liability of the United States which can be enforced against it by the depositor in the Court of Claims, it is inconceivable that the deposit of those funds in a bank by a postmaster to the credit of the Trustees is a deposit of funds of the United States or creates a debt due from the bank to the United States. As we have already shown, the Trustees of the Postal Savings System, in whom the title to all such funds necessarily vests, are trustees for the depositors, and not trustees for the United States. The depositors are the beneficiaries of the trust and the equitable owners of the fund. Congress recognized this fact by providing for the loaning of monies from the fund by the Trustees to the United States, which is inconsistent with any theory of ownership by the United States, and is inconsistent with the theory that the United States becomes a debtor when a depositor makes a deposit in a postal savings depository office. Section 16 of the Act (Appendix, p. 46) which provides that the faith of the United States is solemnly pledged to the payment of deposits made in postal savings depository offices, is wholly inconsistent with the theory that the United States is the owner of the funds so deposited or that the United States becomes the debtor when a deposit is made in a postal savings depository office, because such guaranty would not be necessary, but would be meaningless, if Congress intended that the deposit of funds by a depositor in a postal savings depository office conferred upon the United States owner-

ship of those funds or created a debt due from the United States to such depositor.

The deposits of Postal Savings funds by postmasters in the Woodlawn Trust and Savings Bank were, therefore, not deposits of funds belonging to the United States, and did not create a debt to the United States, either within the meaning of the term "public money," as used in Section 332 of Title 12, U. S. C. A. or within the meaning of "debts due to the United States," as used in Section 3466 R. S. (31 U. S. C. A., Sec. 191).

The Court of Appeals for the District of Columbia, in its decision, relied upon *Richmond, Fredericksburg & Potomac Railroad* v. *McCarl*, 61 App. D. C. 290, 62 F. (2d) 203 (R. 118).

However, the fund under consideration in that case was the general railroad contingent fund created and maintained by the payment of excess income by railroads to the Interstate Commerce Commission in compliance with an Act of Congress, which provided that the fund should be administered by the Commission in the furtherance of the public interest in railway transportation through loans to carriers. The court said that the excess to be paid to the Commission pursuant to the Act was not a tax, like other taxes, payable into the Treasury of the United States for ordinary governmental use, and that the United States possessed no direct beneficial interest in the fund in the sense in which they control the public revenues, but that the United States, through the instrumentality of the Interstate Commerce Commission, hold it, when and as it is paid, as trustee and upon the trusts named in the Transportation Act. The court then said (62 F. (2d) 206):

> "These trusts, as we have seen, authorize the Commission to use it for loans to the weaker carriers or

to the purchase of railway equipment and facilities for their benefit. The act provides that the fund shall be under the control of the Commission and be used by that body in accordance with the purposes of the act, and these purposes are clear and explicit. But, while it is payable to the Commission, and the Commission is required to collect it, and while its disbursement is under the supervision of the Commission, the Commission as such acts as an instrumentality of the United States. *It is, as we think and as was stated by the Supreme Court, an appropriation by the United States of a fund which, for the purposes expressed in the act—i. e., public uses—they have the right to preempt and control.* It is money, therefore, which the carrier has collected and holds as trustee for the United States, and which the United States have a right to demand and receive likewise as trustee, and though it is not moneys which should, or may be covered into the Treasury under section 3617, R. S. (title 31, U. S. C. A. sec. 484), or withdrawn therefrom under section 305, R. S. (title 31, U. S. C. A. sec. 147), which two sections relate to the manner in which funds belonging to the United States shall be deposited and withdrawn from the Treasury, and though the language of the act clearly shows that the fund should not be administered or controlled by the Secretary of the Treasury in the ordinary method relating to public funds, but should be administered by the Interstate Commerce Commission, *the fact remains that the money is payable, if properly due, to the United States, and is subject to such disbursement and control 'for public uses' as Congress may declare.''* (Italics ours.)

The same cannot be said of monies deposited in postal savings depositories. The United States has no right

under the Postal Savings Act to appropriate or pre-empt Postal Savings funds for public uses. The Postal Savings funds are private funds administered by trustees, who act as trustees for the depositors—not as trustees for the United States.

The United States does not occupy the relation of trustee to Postal Savings funds, as the Act of Congress establishing the Postal Savings System specifically designated the trustees who should have the control, supervision and administration of the funds received as deposits at postal savings depository offices, and all of the provisions of the Act are inconsistent with the theory that the United States should have possession and control of Postal Savings funds as trustee, or that the deposit of such funds in a bank to the credit of the Trustees of the Postal Savings System should create a debt to the United States.

II.

The fact that the faith of the United States is pledged to the repayment of deposits in postal savings depository offices does not require that the United States be made a party to this suit.

In its decision the Court below emphasized (R. 118) that the credit of the United States was pledged for the repayment of money deposited in the Postal Savings System and indicated that for this reason the United States were necessary and indispensable parties to the suit.

Section 16 of the Postal Savings Act (Appendix, p. 46) provides that the faith of the United States is solemnly pledged to the payment of the deposits in the Postal Savings depository offices with accrued interest thereon as provided in the Act. However, the deposits in the Woodlawn

Bank were not made to the credit of the United States, or to any governmental department or officer thereof, but to the credit of the Trustees of the Postal Savings System (R. 22) and as shown hereinabove under Point I of this brief, deposits in the Postal Savings depository office do not create a debtor and creditor relationship between the United States and the depositor.

The certificate issued to the depositors in the Postal Savings System is reproduced on page 109 of the record. The certificate is no different from the Act of Congress (Sec. 766, Title 39, U. S. Code). The certificate and the provision of the Act of Congress are merely to the effect that the United States guarantees the repayment of deposits made in postal savings depository offices, with interest accrued thereon. However, the fact that one is a guarantor of debts incurred by another in the operation of his business certainly does not require the guarantor to be made a party to a suit to recover assets illegally pledged to secure the deposit of funds of the debtor in a bank, even though recovery of the assets so illegally pledged may result in the guarantor being ultimately required to pay something under his guaranty. As shown by the Court in *Annie Leka, Administratrix of the Estate of Mike Mesich* v. *The United States, supra,* the provision of the Act of Congress creating the Postal Savings System that the faith of the United States is solemnly pledged to the payment of the deposits made in Postal Savings depository offices, with accrued interest, means that the faith of the United States is pledged to make good any deficiency in case there is a deficiency in the funds, but that this does not mean that the United States can be sued by one of the depositors where there is no question about there being sufficient funds on deposit to meet the claim. Nowhere in the record herein does there appear any evidence showing that if the illegally

pledged assets and their proceeds are returned to the receiver of the bank, as required by the decree, there will not remain sufficient funds in the hands of the Trustees of the Postal Savings System to discharge all liabilities to depositors. Therefore this record does not show that the United States is in any way financially affected by the decree in this case.

But even though an obligation of the United States to make good any deficiency in the funds of the Postal Savings System to meet the obligations incurred by the Trustees in the operation of the System might arise by reason of the return to the receiver of the Woodlawn Bank of the assets which were illegally pledged to secure deposits of Postal Savings funds in that bank and the repayment of the monies credited to the Trustees on account of principal and interest received by the Treasurer from pledged assets, still that would not make a suit by the receiver of the bank against the Trustees and the Treasurer to recover the illegally pledged assets and the monies received from pledged assets, a suit in essence one against the United States or require that the United States be made a party to that suit.

Neither the pledged assets nor the proceeds of the pledged assets belong to the United States and have not been covered into the Treasury, nor is there any law under which they can be so covered as funds of the United States. The securities which the Treasurer has are assets of the bank out of which all creditors are entitled to be paid ratably. In these circumstances it is of no consequence what the United States may or may not do about any deficiency in Postal Savings funds, if one should exist. The question is whether there was a valid authorization of the pledge. If there was not, the Treasurer must restore the pledged assets to the receiver of the Woodlawn Bank, and

the Trustees must refund the proceeds from the illegally pledged assets which have been credited to their account by the Treasurer.

In *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 904, the jurisdiction of the court was challenged in a suit brought against a bank on the ground that the State of Georgia was one of the incorporators and a member of the bank, and that the suit was, therefore, in effect, one against the State of Georgia and could not be maintained because the State was immune from suit. The contention in that case was obviously based on the ground that the State of Georgia would or might sustain some loss if the plaintiff prevailed, but the court said (p. 906):

> "A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia, than against any other individual corporator. The State is not a party, that is, an entire party, in the cause."

And on page 907 the court further said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in Banks are not suable even in their own Courts; yet they never exempt the corporation from being sued."

In that case it is apparent that the enforcement of a judgment against the Planters' Bank would indirectly have

affected the finances of the State of Georgia, just as the enforcement of the decree in this case might indirectly affect the finances of the United States, but, as said in the Planters' Bank case, that does not bar a suit against parties who can be sued on the ground that a sovereign who cannot be sued without its consent may be affected financially by the outcome of the suit. The question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States. *Tindal* v. *Wesley*, 167 U. S. 204.

III.

The fact that the treasurer of the United States is a party to this suit does not make the action one against the United States nor require that the United States be made a party.

The Treasurer of the United States is, by the Act of Congress creating the Postal Savings System, constituted the Treasurer of the Board of Trustees. (Sec. 759, Title 39, U. S. Code.) The assets delivered to him by the Woodlawn Bank were delivered to him merely as pledgee and not to be covered into the United States Treasury as property belonging to the United States or to be disbursed in accordance with any Act of Congress. He recognized the capacity in which he received those assets by issuing receipts therefor, which recited that he received them "in trust for this bank," meaning in trust for the Woodlawn Bank (R. 26, Add. R. 18). This suit against the Treasurer of the United States was, therefore, not one to recover funds or property of the United States in his hands, but was a suit to recover from him property which had been illegally pledged with him and which he holds as pledgee in trust for the Woodlawn Bank to secure deposits to the credit of the Trustees—not deposits to the credit of the

United States—in the Woodlawn Bank, and which, because of such illegal pledging, it is his duty to return to the receiver of the Woodlawn Bank. To say that such a suit against the Treasurer is in essence one against the United States, or that the United States is an indispensable party to such suit, is, in effect, saying that no suit can be brought against the Treasurer of the United States to recover money or property illegally held by him because such suit is one in essence against the United States or that the United States is an indispensable party to any suit against its Treasurer. Such is not the law, as shown by the case of *Houston* v. *Ormes,* 252 U. S. 469, referred to on pages 18 and 19 of the preceding petition.

To the same effect is *Orinoco Co.* v. *Orinoco Iron Co.,* 296 F. 965, affirmed in *Mellon* v. *Orinoco Iron Co.,* 266 U. S. 121, referred to on page 19 of the preceding petition.

Likewise, in this case the petitioner is not seeking to recover anything from the United States and in no event will the United States receive any of the proceeds of the pledged assets if the pledge is foreclosed by sale or collection of the assets by the Treasurer of the United States as pledgee. That part of such proceeds required to pay in full the deposits of Postal Savings funds in the Woodlawn Bank would necessarily be paid over by the Treasurer to the Board of Trustees of the Postal Savings System and any balance remaining to petitioner.

IV.

The fact that the Postal Savings System is an instrumentality of the United States does not prevent a suit against the Trustees of the Postal Savings System nor render the United States an indispensable party to a suit brought against the Trustees.

This point is closely related to propositions I, II and III discussed hereinabove in this brief and the authorities

cited in support of these points are equally applicable under this division of the argument, and, likewise the authorities here cited are applicable to and support the points heretofore made in this brief.

The real parties in interest in this suit are the receiver, representing the general depositors and creditors of the Woodlawn Bank, and the Trustees of the Postal Savings System, representing the depositors in postal savings depository offices.

The conclusion of the court below that a suit against the Trustees is in essence a suit against the United States appears to be based upon the theory that the Postal Savings System, which is not a legal entity, or the Trustees, consisting of individuals, or both combined, constitute an instrumentality of the Federal government, and that a suit against the instrumentality is a suit in essence against the United States. The same proposition has been asserted in numerous cases in an attempt to defeat the enforcement of valid claims against instrumentalities of the Federal government, but has not met with favor by the courts unless the effect of the judgment or decree to be entered would be to control or obstruct some governmental function of the Federal government or to affect funds or property admittedly belonging to the United States.

The fact that the Postal Savings System is an instrumentality of the United States does not render the Trustees immune from suit nor does it require the United States to be made a party to a suit against the Trustees. That is shown by the cases referred to on pages 13 to 15 of the foregoing petition and also by the following cases:

In *Panama R. Co.* v. *Minnix,* (C. C. A. 5) 282 F. 47, the court said (p. 49):

"The liability of the Panama Railroad Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is the sole stockholder."

In the brief of the Attorney General filed on behalf of the Fleet Corporation in *Sloan Shipyards* v. *U. S. Fleet Corporation,* 258 U. S. 549 (555-560), the Attorney General classified into five general classes the suits which, although brought against an officer or agent of the Government, are not considered suits against the sovereignty, citing cases falling within each class. His fifth class is as follows:

"(5) To recover specific property, real or personal, because of the present wrongful action of an official, in good faith, and under color of office, unlawfully withholding plaintiff's property under the erroneous belief that the law authorized such withholding."

That class includes this case.

In *Osborn* v. *U. S. Bank,* 9 Wheat. 738, the United States Supreme Court said (p. 870):

"Where right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title."

In *Sloan Shipyards* v. *U. S. Fleet Corporation, supra,* 258 U. S. 549, the court said with reference to the liability of the Fleet Corporation to be sued (pp. 567-568):

"The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act."

In *United States* v. *Lee,* 106 U. S. 196, referred to on pages 15 and 16 of the foregoing petition, the court said (pp. 215-216):

> "This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson, Brown* v. *Huger,* and *Grisar* v. *McDowell,* it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

It would unduly and unnecessarily prolong this brief to quote from the numerous decisions holding that a suit against an instrumentality of the United States or against an officer of the United States is not necessarily a suit against the United States or a suit to which the United States is a necessary party. We, therefore, merely refer to additional cases in which it was so decided as follows: *Federal Sugar Ref. Co.* v. *U. S. Sugar Equalization Board,*

Inc., 268 F. 575; *Providence Engineering Corp.* v. *Downey Shipbuilding Corp.* (C. C. A. 2), 294 F. 641; *Merchants Fleet Corp.* v. *Harwood*, 281 U. S. 519; *Panama R. Co.* v. *Curran*, 256 F. 768; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Keiffer & Keiffer* v. *R. F. C.*, 306 U. S. 381.

CONCLUSION.

It is therefore respectfully submitted that the United States Court of Appeals for the District of Columbia erred in deciding that the United States were necessary and indispensable parties to this suit and for the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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